Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217

COMMENTS OF AT&T CORP.

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TABLE OF CONTENTS

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Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, and the Commission's Public Notice of November 30, 2001 (DA 01-2751), Petitioner AT&T Corp. ("AT&T") submits the following comments.

INTRODUCTION AND SUMMARY

At the outset, it bears emphasizing that the administrative record already compiled in this proceeding is massive and irrefutable with regard to the pressing need for regulatory action by the Commission to ensure reasonable and nondiscriminatory access by LECS (CLECs *and* ILECs) to multiple tenant environments ("MTEs"). *See* Part I.A.[1] Indeed, despite the fact that hundreds of comments and reply comments have been submitted thus far, there can be no real dispute that market data reflect an intolerable two-tiered system for access to

[1] *See*, *e.g.*, Comments of AT&T Corp., *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 (filed January 22, 2001) (AT&T 2001 Comments); Reply Comments of AT&T Corp., *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 (filed February 21, 2001) (AT&T 2001 Reply Comments); Comments of AT&T Corp., *Promotion of Competitive Networks in Local Telecommunications Markets, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217, CC Docket No. 96-98 (filed August 27, 1999) (AT&T MTE Access Comments); Reply Comments of AT&T Corp., *Promotion of Competitive Networks in Local Telecommunications Markets, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217, CC Docket No. 96-98 (filed Sept. 27, 1999) (AT&T MTE Access Reply Comments).

MTEs. ILECs, because of their overwhelming market power, are able to extract favorable treatment from MTE owners with respect to the rates, terms and conditions of their access. CLECs, such as AT&T, are relegated to second-class status, and their efforts to provide facilities-based competition to the same MTE tenants are impeded by unreasonable and discriminatory conduct by both ILECs and MTE owners. Indeed, the Real Access Alliance ("RAA"), the principal advocate for MTE owners during this proceeding, has confirmed that this double standard exists, that MTE owners intend that this discriminatory status quo should persist, and that, in RAA's view, it would not be "fair" if "the CLEC would get the same terms from the building owner as the ILEC."[2] Simply put, the existing administrative record vividly demonstrates a persistent problem with respect to MTE access by CLECs that threatens the development of facilities-based competition and calls out for regulatory action by the Commission to ensure that CLECs receive the same reasonable, and nondiscriminatory access to MTEs as do their ILEC counterparts.

This stark disparity is intolerable because CLEC access to MTEs is critical to the development of facilities-based competition. Almost 30 percent of the 105 million residential households nationwide are located in MTEs. In some areas, such as New York City, the percentage exceeds 70 percent. Although providing telephone service is a capital intensive investment that involves high fixed costs, MTEs are an attractive opportunity for many CLECs because MTEs provide potential for a high concentration of customers in a very limited geographic footprint, which means that a new entrant can market its services to MTEs in a more productive and cost-effective manner. Despite the seemingly attractive economics of providing

[2] Comments of Real Access Alliance, *Promotion of Competitive Networks in Local Communications Market*, WT Docket No. 99-217, at 41-42 (Jan. 22, 2001) ("RAA 2001 Comments").

access to MTEs, competition for MTE tenants has been slow to develop, in large part, because ILECs have both the ability and the incentive to discriminate against their new competitors.

Thus, as AT&T has explained previously, the Commission has not only a compelling factual record upon which to predicate its regulatory action, but also the necessary legal authority to adopt a nondiscriminatory access requirement that would prohibit any LEC from providing anything "other than basic local service, and prohibit[] the provision of any vertical features, or enhanced or advanced services (as well as long distance service from the serving LEC)" to those MTEs where reasonable, nondiscriminatory access is not available to CLECs and ILECs alike. AT&T 2001 Comments at 17, n.12. Further, the Commission's exercise of its express authority to adopt such a requirement would not constitute a taking without just compensation, and therefore would be unaffected by any limitations imposed by the Takings Clause of the Fifth Amendment. *See* Part I.B.

As shown in Part II, more recent market evidence merely bolsters the continuing need for regulatory intervention by the Commission. What was true before – a two-tiered standard for access to MTEs that impedes the development of facilities-based competition by CLECs – remains true today. The only difference is that CLECs have suffered from the burdens of this discriminatory system for an additional year without the benefit of necessary regulatory action by the Commission. First, it remains the case that ILECs continue to exercise their market power over bottleneck facilities by impeding, in myriad ways, access to MTEs by CLECs. Second, MTE owners also have acted to hobble the efforts of CLECs to gain access to MTE tenants by (i) delaying access through unduly lengthy negotiation processes, (ii) imposing discriminatory terms and conditions as a requirement for access, or (iii) simply denying access to

their facilities by CLECs. The most-current evidence thus confirms that there is a significant and intractable problem that calls out for agency action. *See* Part II.A.

That pressing need for Commission action is not obviated by the RAA's efforts to promote a Model Access Agreement. To the contrary, the only true impact of the RAA proposal is to divert attention from the continuing need for regulatory relief. Indeed, the RAA proposal does not even purport to address discrimination against CLECs by MTE owners. What is more, even if it did address that discrimination, RAA's proposal still would not make any difference because AT&T is aware of virtually no instances in which this proposal is even being used by MTE owners or telecommunications providers as a basis for conducting negotiations. That is not surprising, given that the RAA proposal – which is more than 50 pages long, including attachments – is simply too cumbersome to provide a meaningful starting point for negotiations regarding access with MTE owners. *See* Part II.B.

The need for regulatory action by the Commission is thus clear. Congress' goal of promoting facilities-based competition is in jeopardy because CLECs, to compete in a meaningful way against monopoly ILEC providers, must have access to tenants in MTEs. The ability of ILECs to wield their substantial market power and thus demand access on rates, terms and conditions that are materially more favorable than their would-be competitors provides a substantial barrier to the development of facilities-based competition that the Commission has rightfully concluded would bring benefits to MTE tenants and consumers across the country.

ARGUMENT

I. THE EXISTING ADMINISTRATIVE RECORD CONFIRMS THAT THE COMMISSION CAN AND SHOULD ADOPT A NONDISCRIMINATORY ACCESS REQUIREMENT.

These comments, and the Public Notice to which they respond, are part of an already substantial regulatory record that demonstrates, clearly and cogently, that a nondiscriminatory access requirement for multi-tenant environments ("MTEs") is both necessary and appropriate. As AT&T demonstrated in its previously filed comments, and reconfirms in these comments, the discriminatory, anti-competitive actions of both incumbent local exchange carriers and MTE owners have seriously limited competition for residential local exchange service and the ability of millions of citizens to receive their local service from the provider of their choice. Because this situation conflicts with the competitive goals of both Congress and this Commission, the Commission should exercise its authority to remedy the anti-competitive actions that are currently preventing facilities-based competition to develop in the provision of telecommunications services to MTEs.

A. The Existing Record Reflects That Competition For The Provision Of Telecommunications Services In MTEs Has Been Undermined By The Conduct of ILECs And MTE Owners.

Hundreds of filings – comments, reply comments, and *ex parte* submissions – have already been made in this proceeding, making clear that Commission action is necessary to ensure that CLECs receive nondiscriminatory access to MTEs. As AT&T explained in 2001, "[t]he Commission has developed a massive record that establishes the pressing need for comprehensive regulation to foster consumer choice and competition in the provision of local telecommunications services to MTE tenants." AT&T 2001 Comments at 7. This record makes clear "that 'competitive LECs have in many instances encountered unreasonable demands and

significant delay in their efforts to obtain access to buildings'," including being "'denied access to buildings completely, or have been charged exorbitant rates for access or been subjected to unreasonable conditions.'" AT&T 2001 Comments at 7 (quoting *FNPRM* ¶¶ 17-18).

Although AT&T supports the steps already taken by the Commission toward achieving competition in this crucial segment, the record establishes "that these first steps are not enough to create a truly competitive MTE environment." *Id.* at 8. In particular, the Commission has not addressed in a meaningful way the abuses – whether done by ILECs or by MTE owners – that exclude competitive LECs from serving MTEs. AT&T 2001 Comments at 8-9.

Specifically, commenters such as AT&T have previously detailed numerous barriers to MTE competition created by incumbent LECs and building owners. AT&T has faced delays, refusals to deal, and other means of precluding or reducing CLEC access to MTEs, and these barriers ultimately "den[y] [MTE] tenants access to competitive telecommunications options." AT&T 2001 Comments at 10 (citing AT&T MTE Access Comments 6-8; AT&T MTE Access Reply Comments 4-7). As of 2001, "[m]any incumbent LECs continue[d] to deny competitive LECs access to unbundled network elements necessary to provide service to MTE tenants and seek to impose unnecessary and uneconomic costs on competitors through a wide variety of anti-competitive conduct. And many building owners continue[d] to wield their substantial market power to deny their tenants the benefits of competition for the provision of telecommunications services." *Id.* Such discriminatory treatment is not limited to one geographical region; rather, all of the ILECs have been engaging in wrongful conduct designed solely "to thwart competitive access to MTEs by imposing unnecessary processes, that result in increased costs and delays." *Id.* at 10-11. Other commenters have likewise been the victims of wrongful conduct by ILECs. For example, because of ILEC abuses, Federal Executive

Agencies "have experienced delays to implement the results of competitive procurements for local telecommunications services." GSA at 4.

Similarly, MTE owners to this day continue to "refus[e] to deal with competitive LECs, . . . engage[] in unnecessarily protracted negotiations, and . . . attempt[] to impose burdensome and discriminatory conditions on new entrants, including excessive charges on new access." AT&T 2001 Comments at 12 (citing AT&T MTE Reply Comments 4-5); *see also*, *infra*, 15-17. These fees include "substantial revenue sharing provisions, monthly recurring fees well above commercial rates, and one-time processing and administrative fees." AT&T 2001 Comments at 12. MTE owners, in the meantime, often either force CLECs "to bear higher costs than incumbents [and] . . . to agree to terms that are not imposed on the incumbent" or else entirely block access to MTEs. *See* Cox 2001 Comments at 3.

The building owners cannot, and do not, deny that such discrimination is endemic. Indeed, in its 2001 comments, the RAA, which represents about 10 percent of all MTE owners, candidly acknowledges that MTE owners have not in the past offered (and have no plans in the future to offer) the same rates, terms, and conditions of access to CLECs as they offer to ILECs. RAA 2001 Comments at 41-42. While the RAA tries to justify that discrimination as a response to the "market power" of the ILECs, the fact remains that the RAA would have the Commission do nothing to address ILECs' exercise of this "market power." Instead, the RAA would allow ILECs to continue to reap the unearned benefits of their market power, and leave CLECs subject to outrageously high fees and other discriminatory treatment. *Id.*

Such a discriminatory two-tiered system is precisely what ILECs have intended: CLECs have been forced to struggle unnecessarily to make any inroads in MTEs against their ILEC competitors. CLECs obviously have motivation to target MTEs, which "frequently offer a

relatively large revenue opportunity in a limited space" and therefore "can be the most efficient environments for many competitive LECs initially to serve." *FNPRM* ¶ 12. Consistent with the Commission's reasoning, CLECs, including AT&T, have made substantial efforts to serve MTE tenants. Yet the most recent data indicate that only 5 percent of all commercial tenants and only *one percent* of all residential tenants are served by CLECs. *See* Association for Local Telecommunications Services, *The State of Local Competition 2001*, 28 (Feb. 2001) (available at http://www.alts.org/Filings/022001AnnualReport.pdf). As such, a critical foothold for facilities-based competition by CLECs has thus far been effectively foreclosed. And, as AT&T explains in Part II, *infra*, these problems continue to date and show no sign of abating.

B. The Commission Has Ample Authority To Impose Nondiscriminatory Access Requirements On Incumbent Local Exchange Carriers.

As the administrative record also amply demonstrates, the Commission clearly has the legal authority to implement and administer a nondiscriminatory access rule that would prohibit ILECs from providing service or providing anything but basic local service (without any vertical features, enhanced or advanced services, or long distance provided by the provisioning LEC) to MTEs where reasonable, nondiscriminatory access to the MTE facilities and tenants is not available to CLECs and ILECs alike. *See* AT&T 2001 Comments at 17 & n.12. Nothing in the Takings Clause of the Fifth Amendment or in relevant precedent undermines the Commission's affirmative authority to remedy the anti-competitive acts currently occurring in the MTE-LEC market.

The Commission has affirmative authority to adopt a nondiscriminatory access requirement. Two statutes provide the Commission with the authority "to prohibit dominant telecommunications carriers . . . from entering into exclusive contracts with building owners for the provision of service that necessarily and inseparably includes interstate exchange access

service." AT&T MTE Access Comments at 25-26; *see also* AT&T MTE Access Reply Comments at 27. First, Section 201(b) authorizes the Commission to regulate "practices . . . for and in connection with [interstate or foreign] communication service" to ensure that they are "just and reasonable." 47 U.S.C. § 201(b). Under Section 201(b), the Commission may regulate the contractual or other arrangements between common carriers and non-Commission regulated entities such as building owners – including precluding ILECs from enforcing exclusive contracts and other existing discriminatory arrangements they might have with building owners. AT&T MTE Access Comments at 25 & n.28, 27. Second, the Commission has authority under Section 205(a) "to determine and prescribe . . . what classification, regulation, or practice is or will be just, fair, and reasonable" when it concludes that the practice of the common carrier "is or will be in violation of any of the provisions of this Chapter." 47 U.S.C. § 205(a). As AT&T noted in 2001:

> Taken together, Sections 201(b) and 205(a) grant the Commission authority to prohibit (or condition) LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE. That is, the Commission has authority to conclude that the provision of service by a LEC to an MTE under conditions that "place its competitors at an unfair competitive disadvantage," *FNRPM*, ¶ 135, is a practice that is not "just and reasonable," 47 U.S.C. § 201(b), and that provision of service under those circumstances would be "just, fair, and reasonable," *id.* § 205(a), only if the LECs' competitors have nondiscriminatory access to the MTE.

AT&T 2001 Comments at 18-19. And, under *Cable & Wireless P.L.C.* v. *FCC*, 166 F.3d 1224 (1999), and *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945), the fact that regulation of ILECs will have an indirect effect on building owners does not bar the Commission's proper exercise of its authority to prevent LECs "from dealing with MTEs that discriminate among providers of telecommunications services to ensure that the interstate communications market

becomes more competitive and that the rates charged and services provided to the public are just and reasonable." *FNPRM* ¶ 143. Because the Commission's exercise of its authority in this context is to bring about congressionally-mandated, long-sought facilities-based competition, "a regulation preventing LECs from providing service under circumstances that would hinder the development of facilities-based telephone competition clearly falls within the Commission's authority" under both Sections 201(b) and 205(a). AT&T 2001 Comments at 21.

The proposed regulation is consistent with the Fifth Amendment and with all relevant caselaw. As AT&T has already made clear, *see* AT&T 2001 Comments at 21-31; AT&T 2001 Reply Comments at 18-22, the proposed nondiscriminatory access regulation would not violate the Taking Clause of the Fifth Amendment – which prohibits "private property" from being "taken for public use, without just compensation" – because such a regulation does not effect a taking and, in any event, would require the private payment of "just compensation" sufficient to satisfy both the Constitution and the D.C. Circuit's decision in *Bell Atlantic Telephone Co.* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

The Commission's proposed nondiscriminatory access regulation does not effect any taking of building owners' property. Significantly, the regulation would not even regulate building owners and, as such, cannot "take" the building owners' property in any Fifth Amendment sense. *See* AT&T 2001 Comments at 22-23; AT&T 2001 Reply Comments at 18-20. Additionally, as case after case has made clear, the government does not effect a *per se* taking where it requires that an entity that already has permitted access to its property, do so in a nondiscriminatory manner. *See, e.g.*, *Yee* v. *City of Escondido,* 503 U.S. 519, 529 (1992) (holding that "[w]hen a landowner decides to rent to tenants, the government *may . . . require the landowner to accept tenants he does not like without automatically having to pay*

compensation") (citations omitted) (emphasis added); *FCC* v. *Florida Power*, 480 U.S. 245, 252-53 (1987) (concluding that the Pole Attachments Act did not authorize a *per se* taking because "it is the invitation, not the rent, that makes the difference"); *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 83-84 (1980) (concluding that requirement that shopping center, which was open to the public, permit unwanted expressive speech did not effect a taking); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261 (1964) (holding that public accommodations provisions of the Civil Rights Act of 1964 which mandated that property owner serve patrons regardless of race did not constitute a taking). *Cf. Loretto* v. *Teleprompter Manhattan City Corp.*, 458 U.S. 419, 427 (1982) (concluding that taking occurred where the property owner did not invite entry by any cable companies onto its property). Here, the proposed regulation (which regulates LECs, not MTE owners) simply mandates "that access to property, once invited by a landowner, be given on a nondiscriminatory basis." AT&T 2001 Comments at 22. And, because the proposed regulation merely requires nondiscriminatory access, regulates the historically-regulated provision of telecommunications, and requires private payment of "just compensation," it would not be a regulatory taking. *See* AT&T 2001 Comments at 26-27; *see generally Penn Central Trans. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978) (setting forth standards governing regulatory takings).

The requirement of private payment of "just compensation" also ensures that, even if the nondiscriminatory access regulation of LECs were to be termed a "taking" – which it is not – the regulation will not run afoul of either the Takings Clause or the D.C. Circuit's *Bell Atlantic* decision. "[S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985). "By incorporating the judicial review provisions into the

requirement of private payment of just compensation, the Commission would appropriately protect the MTE owner's right to receive constitutionally sufficient compensation." AT&T 2001 Comments at 28 (quoting *Gulf Power Co. v. United States*, 187 F.3d 1324, 1336-37 (11th Cir. 1999)).[3] And, because the Commission's proposed regulation, unlike the rules vacated in *Bell Atlantic*, would explicitly result in private payment of "just" – as opposed to "reasonable," *id.* at 1445 n.3 – compensation, *Bell Atlantic* cannot, and does not, preclude the Commission from taking the appropriate action of barring LECs from engaging in discriminatory access schemes.

II. CURRENT EVIDENCE CONFIRMS THE NEED FOR ADOPTION OF A NONDISCRIMINATORY ACCESS REQUIREMENT BY THE COMMISSION.

More recent evidence merely confirms the need for the Commission to adopt a nondiscriminatory access requirement governing the provision of telecommunications services to MTEs. Indeed, the conduct of ILECs and some MTE owners continues to thwart efforts by CLECs to provide choice and competition to MTE tenants. Further, action by the Commission is warranted because proposals such as the voluntary Model Access Agreement advanced by the RAA do not address the problem of discriminatory treatment of CLECs and, even if they did, they have had little, if any, impact on the ability of CLECs to obtain access to MTEs.

A. The Conduct Of ILECs And Of MTE Owners Continues To Thwart Efforts By CLECs To Provide Facilities-Based Competition To MTEs.

The substantial efforts by CLECs to provide consumer choice and competition to MTE tenants continue to be hobbled by the conduct of ILECs exercising their market power and by some MTE owners that impose discriminatory and unreasonable terms of access on CLECs.

[3] Additionally, as AT&T noted, "unlike *Bell Atlantic*, the Commission's proposed nondiscriminatory access rule does not mandate direct physical access by a third party onto a building owner's property. Indeed, the Commission's proposal does not involve regulation of property owners at all, but instead regulates telecommunications carriers and the circumstances under which they may provide service to a building owner." AT&T 2001 Comments at 29.

Simply put, more-recent data confirm that the anti-competitive conduct of the ILECs and some MTE owners has continued unabated, while the number of CLECs in a financial position to provide competitive choices to MTE tenants has dwindled in the face of these enduring and substantial barriers to competitive entry to MTEs.

ILEC efforts to impede competition have continued. In late 2000 and early 2001, in Washington State, AT&T's attempts to obtain access to tenants in MTEs were targeted by Qwest, which implemented a policy of placing padlocks on its terminals and denying AT&T reasonable access to its subloop inside wiring in multiple dwelling units. As a result of Qwest's padlocking of its terminals, AT&T could not market its services to hundreds of customers for several months, was forced to delay and reschedule countless installation orders (resulting in loss of revenues), and suffered, not surprisingly, cancelled orders when customers that expected AT&T service were denied such service. The Washington Utilities and Transport Commission ("WUTC") ruled against Qwest's policy of denying reasonable access to its subloop inside wiring in multiple dwelling units. In April 2001, the WUTC held that AT&T was entitled to "access" to MTEs via Qwest-owned inside wiring, and ordered Qwest "to promptly provide access to AT&T in any technically feasible manner requested by AT&T." *AT&T Communications of the Pacific Northwest, Inc.* v. *Qwest Corp.*, No. UT-003120, Second Supplemental Order Granting Motion to Amend Answer, Denying Emergency Relief and Denying Motion for Summary Determination, ¶¶ 44, 48 (Apr. 2001).

In Virginia, Verizon continues to demand terms and conditions for interconnection that serve only to raise AT&T's costs or otherwise impede AT&T's access to MTEs. To provide service to an MTE tenant, AT&T must gain access to the end user's premises or access to the inside wiring itself, which often is owned or controlled by the ILEC. Yet, in

Virginia, Verizon insists that its employees perform the cross-connects to on-premises wiring owned or controlled by Verizon (*i.e.*, in buildings constructed prior to May 1, 1986). Moreover, Verizon insists that AT&T pay to have a Verizon employee conduct the work even though the ability of a CLEC to perform such work itself has been ruled to be technically feasible by state commissions and permitted by the Commission,[4] and thereby imposes unnecessary costs upon AT&T.

Further, Verizon has insisted, as a term and condition of its interconnection agreement with AT&T, that anytime AT&T seeks to put equipment in an MDU or MTE to access the subloops, AT&T must first collocate with Verizon through use of a CLEC outside plant interconnection cabinet ("COPIC").[5] That collocation, in turn, requires AT&T to (i) obtain a right-of-way from the property owner for placement of the COPIC, (ii) submit a request to Verizon, (iii) wait up to sixty days for Verizon to respond, and (iv) then wait again for construction of the collocation site. All of the costs and delays associated with this cumbersome process are unnecessary as it is technically feasible for AT&T simply to interconnect with Verizon's network directly on the MDU or MTE premises. By requiring construction of a separate collocation facility, however, Verizon unnecessarily seeks to increase the time, money and resources that AT&T must invest to provide service to MTE tenants.

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[4] *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report & Order, 15 FCC Rcd. 3696, ¶ 237, 240 (1999) ("*UNE Remand Order*").

[5] *See* Verizon's Post-hearing Reply Brief on Non-Cost Issues, *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the Virginia State Corporation Commission regarding Interconnection Disputes with Verizon Virginia, Inc.*, CC Docket Nos. 00-218, 00-249, 00-251, at UNE-29 (Dec. 11, 2001) ("All connections to Verizon VA's feeder distribution interface (FDI) must go through the CLEC outside plaint interconnection cabinet (COPIC)").

Nor is such anti-competitive conduct limited to ILECs. For example, AT&T has reached an agreement to provide telecommunications service to a significant business client with offices in locations across the country. In Atlanta, Georgia, however, a large MTE owner has reached an agreement with a building LEC ("BLEC"), Level III, that provides the BLEC with exclusive control over the telecommunications vault to which AT&T must gain access before it can provide service to its MTE customer. Put another way, the MTE owner has entered into an agreement with a BLEC that grants AT&T's competitor control over access to the bottleneck facilities necessary for AT&T to serve an important MTE client that already has requested and expects that AT&T provide it service. AT&T and its customer suffer, while the MTE owner presumably benefits from its agreement with the BLEC, and the BLEC benefits by insulating itself from competition. Absent regulatory intervention, the BLEC has no incentive to provide access to a competitor, the MTE tenant is deprived of its choice of telecommunications provider, and AT&T is denied the ability to compete by providing service to a valued customer.

AT&T's efforts to provide access to MTEs also have been impeded by MTE owners directly in myriad ways. Absent the necessary regulatory incentives, negotiations with building owners increasingly have dragged on, some as long as 18 months. Indeed, after endless negotiations with respect to a given MTE facility, AT&T often must start again at square one even when it is negotiating with the same MTE owner because some MTE owners will seek to renegotiate and water down clauses that previously had been accepted. This conduct sometimes can be explained by the existence of preferential marketing agreements between the MTE owners and the ILECs, which create incentives for the MTE owner to limit the number of choices available to its tenants so that the owner can maximize the revenue from its preferential marketing agreement.

These barriers erected by MTE owners (either unilaterally or at the insistence of an ILEC) have real consequences. For example, in the Denver, Colorado area, AT&T's efforts to provide broadband telephony service to nearly 900 MTE complexes and almost 15,000 MTE residents have been impeded by MTE owners who either refuse to enter into an access agreement with AT&T or who, after entering into agreements, refuse to allow technical staff to install the necessary equipment to allow AT&T to provide such service. In doing so, these MTE owners contend, among other things, that (i) their residents "do not need a choice" in service providers, (ii) they have an exclusive agreement with Qwest, (iii) they are concerned with the appearance of the equipment or wiring on their premises, or (iv) they do not have the time to provide AT&T personnel with access to rooms necessary to do work.

Current experience also confirms that a regulatory ban on exclusive agreements alone is inadequate because ILECs and MTE owners can accomplish the same result through other means. Indeed, some MTE owners have insisted upon terms and conditions of CLEC access that are patently unreasonable and would never be proposed to monopoly ILECs. In New Jersey, AT&T was involved in negotiations with a large building owner for the right to provide telecommunications services to its residential tenants. The building owner, however, insisted that AT&T pay $800 per residence, or approximately $1.8 million, merely for the right to market its services to the MTE's residential tenants. Such proposals merely highlight that a ban on exclusive agreements by ILECs, though a positive development, does not address the fundamental concern that discriminatory treatment of CLECs can just as easily block CLEC access to MTEs and deny MTE tenants competitive choices by rendering CLEC access theoretically possible but economically unworkable.

Similarly, in Florida, AT&T negotiated an access agreement with a developer of three large condominium developments for the purpose of providing telecommunications services to the developments' tenants. AT&T paid about $1 million for access rights to the three developments, each of which contained between 50 and 100 separate buildings. Nevertheless, when AT&T sought to provide access to the specific condominium buildings in these three developments, AT&T was told that it must also negotiate separate access agreements with each of the condominium associations that own each of the buildings on the development. Thus, after expending about $1 million and the time and effort to negotiate access to these developments, AT&T was informed that multiple, additional negotiations were necessary before AT&T could provide telecommunications service to any tenant.

B. RAA's Model Access Agreement Has Had No Impact On The State Of The Market And Has Not Obviated The Need For Regulatory Action By The Commission.

RAA's initiative to implement a model access agreement and "best practices" guide is no substitute for a nondiscriminatory access rule administered and enforced by the Commission.[6] The Commission has previously expressed hope that voluntary action, facilitated by RAA's long-promised model agreements and policy statements, would resolve the serious problems endemic in the market for provision of telecommunications services for MTEs. *FNPRM* ¶ 126. But, despite RAA's initiative, no voluntary end to the ILECs' and MTE owners' stone-walling is in sight. This is unsurprising. As AT&T noted when RAA's draft agreement was being circulated, the initiative was unlikely to remedy discriminatory access issues because the draft simply did not create standard, clear, and fair procedures or timeframes for addressing requests for a given CLEC to service a given building, and "nowhere purports to address the

[6] The Model Access Agreement ("*RAA Model Agreement*") and "best practices" ("*Best Practices Guide*") may be found at www.realaccess.org.

Commission's core concern that the access provided by MTE owners to a competitive LEC must be 'nondiscriminatory.'" AT&T 2001 Comments at 13 (quoting *FNPRM* ¶ 126).

Despite these criticisms, and those of other commenters, RAA did not revise the Model Agreement or Best Practices Guide to preclude discrimination or to require parity in treatment. Thus, under the RAA proposal, MTE owners may continue to discriminate against CLECS – both by subjecting them to overly long, unpredictable processes and by applying discriminatory fees and other requirements for access to MTEs. *See, e.g.*, *RAA Model Agreement*, Art. 1 – Term Sheet, §§ 1.09, 1.10 (providing for "License Fees" and "Annual Increase"). Just as with the draft proposal, neither the RAA Model Agreement nor its Best Practices Guide even addresses the nondiscriminatory treatment for CLECs. Thus, as AT&T noted with the draft proposal, "even if the proposal does not, by its terms, provide 'exclusive' access to any one telecommunications carrier, the MTE owner may achieve the same practical result simply by discriminating among telecommunications providers with respect to other critical terms that would equally block access to MTEs by competing LECs." AT&T 2001 Comments at 14. In short, RAA's initiative does nothing to address the discriminatory treatment of CLECs by building owners. As such, even if the RAA's proposal were to be adopted by the MTE industry, it still would fail to address the serious problems plaguing access to MTEs.

In any event, the RAA proposal is not being implemented. At 58 pages, including introductory definitions, contractual terms, suggested exhibits, and four suggested schedules, it is simply too long and cumbersome to serve as a starting point for negotiations regarding access to MTEs.[7] Nor does it address the key problem of ensuring that CLECs receive *nondiscriminatory*

[7] Indeed, it is sufficiently long and has so many blanks to be filled in, that the first "best practice" suggested by the RAA is to "Fill in the Blanks" – which the RAA has identified in a two-page table. *See Best Practices Guide* at 1, 7-8.

access, *i.e.*, that ILECs are not given preferential treatment. Additionally, this proposal is at best aspirational – it can do nothing about the serious incentives that both ILECs and building owners have to discriminate against CLECs. In light of these fundamental problems, the RAA proposal has, predictably, failed to weaken the MTE bottleneck. For example, virtually no MTE owner has attempted to use the RAA proposal as a starting point for negotiations with AT&T.[8] The RAA proposal is just too flawed, both theoretically and practically, to resolve the serious problems at issue in this proceeding. The Commission, on the other hand, can and should act resolve these problems by ensuring nondiscriminatory access to MTEs.

C. The Commission Can and Should Impose A Nondiscriminatory Access Obligation Upon ILECs That Provide Service To MTEs.

For facilities-based competition to succeed, CLECs need a pool of customers from which to gain both revenues and a good reputation on which to build. As the Commission has acknowledged, MTEs can be an excellent venue for CLECs to attain large, concentrated pools of customers. *FNPRM* ¶ 12. But, as the record makes clear, CLECs have had difficulty gaining access to MTEs, and, in fact, very few MTE tenants have the ability to choose to obtain their service from a CLEC. The record also makes clear that these access problems came about because of the concerted efforts of both ILECs and some building owners to keep CLECs out of MTEs.

This situation undermines Congress's express goal of "shift[ing] monopoly [local telephone] markets to competition as quickly as possible." H.R. Rep. No. 104-204, at 89 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 55. *See also FNPRM* ¶ 3 ("One of the most important goals

[8] It is also notable that both the Model Agreement and Best Practices Guide have been available in draft form for well over a year and, while it was not finalized, could have been used by any MTE owner as a basis for negotiations. Yet neither the draft nor finalized versions of these documents have received widespread use.

of the 1996 Act was to bring competition to the traditionally monopolistic market for local telecommunications services."). It is also contrary to the Commission's goal of "removing obstacles to competitive entry into local telecommunications markets by any of the avenues contemplated in the 1996 Act," and, particularly, of increasing facilities-based competition, which "offers the best promise of ultimately creating a comprehensive system of competitive networks, in which today's incumbent LECs no longer will exert bottleneck control over essential inputs, but will compete on a more equal basis with their rivals." *FNPRM* ¶ 4.

The Commission should exercise its affirmative authority, under Sections 201(b) and 205(a), to remedy this serious impediment to competition, for, unlike states or individuals, the Commission has the ability to fashion a nationwide remedy that will create parity and predictability in this crucial segment. Without such a remedy, ILECs will retain the ability to preclude competition, to maintain their monopolies, and to prevent consumers from reaping the benefits of choice and competition. The proposed nondiscriminatory access regulation is an excellent means of remedying the barriers to entry that plague the MTE segment, as it would give both ILECs and building owners strong incentives to cease their anticompetitive acts. Accordingly, AT&T urges the Commission to adopt the proposed nondiscriminatory access regulation.

CONCLUSION

For the foregoing reasons, and those offered in AT&T's previous Comments in this docket, the Commission should (i) adopt a nondiscriminatory access obligation on ILECs, (ii) extend the prohibition on exclusive contracts to residential MTEs and rule that existing exclusive contracts may not be enforced, (iii) prohibit incumbent LEC preferential marketing

arrangements, (iv) modify its construction of the scope of "right-of-way" obligations under section 224, and (v) decline to extend the cable inside wiring rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served, by the noted methods, the 8th day of March, 2002, on the following:

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